Filed 11/23/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERMAN EDWARD SANCHEZ, Defendant and Appellant.	E046099 (Super.Ct.No. RIF123815) OPINION

APPEAL from the Superior Court of Riverside County. William A. McKinstry, Judge. (Retired judge of the Alameda Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A, II.B, II.D, III, IV, V, VI, VII, VIII and X.

Edmund G. Brown Jr., Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Ronald Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

When defendant German Edward Sanchez was 17 years old, he and an accomplice robbed two female employees of a pizza parlor. There was evidence that defendant was a member of the Corona Varrio Locos gang (although his accomplice apparently was not).

A jury found defendant guilty on two counts of second degree robbery. On each of these two counts, it found a personal firearm use enhancement to be true. (Pen. Code, § 12022.53, subd. (b).) It also found defendant guilty of the substantive offense of gang participation.[1] (Pen. Code, § 186.22, subd. (a).) However, it found gang enhancement allegations in connection with the robbery counts to be not true. (Pen. Code, § 186.22, subd. (b).) The trial court sentenced defendant to a total of 16 years in prison.

Defendant contends that the imposition of separate and unstayed sentences for both gang participation and robbery constituted multiple punishment in violation of Penal Code section 654 (section 654). We will hold that section 654 precludes multiple punishment for both (1) gang participation, one element of which requires that the defendant have "willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of th[e] gang," and (2) the underlying felony that is used to satisfy

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[1] This crime is sometimes also called "street terrorism." (E.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 625-626 [Fourth Dist., Div. Two].)

this element of gang participation. Accordingly, we will modify the judgment to bring it into compliance with section 654.

Defendant also contends that there was insufficient evidence that he promoted, furthered, or assisted in any felonious criminal conduct by gang members to support his conviction for gang participation. We are publishing this portion of our opinion because it furnishes some of the necessary legal background for our discussion of section 654. However, we will hold that there was sufficient evidence of this element.

In the unpublished portion of this opinion, we find no other prejudicial error. Hence, we will affirm the judgment as modified.

I

FACTUAL BACKGROUND

A. *The Robbery of Five Buck Pizza*.

On December 7, 2005, victims Bianca Mora and Diana Alvarez were working at Five Buck Pizza in Corona. Around 5:30 p.m., defendant and "another guy" came into the restaurant. The two men were wearing bandannas over their faces and holding guns. They pointed their guns at the women and told them to stop what they were doing.

Despite defendant's bandanna, Mora recognized him. She had "s[een] him around" at her high school. Also, defendant's girlfriend worked at Five Buck Pizza, so Mora had seen him at the restaurant.

Defendant approached Mora, still pointing his gun at her. He told her to open the safe. He then led her to the back of the building, where the safe was. At first, Mora made

a show of trying to open the safe but without actually entering any numbers. After about two minutes of this, however, defendant got mad; he yelled at her and hit her with the gun "several times." She then tried to actually open the safe. At first, it seemed to be "jammed," but eventually it opened. She gave defendant the money that was inside.

Meanwhile, the second man "grabbed" Alvarez, put his gun up to her back, and told her to open the register. For some reason, however, she was not able to do so. Still holding the gun to her back, the second man walked her back to where defendant and Mora were. After a discussion between the men, the second man pushed Alvarez into the bathroom. Alvarez then heard the second man say, "[C]ustomers. Let's bounce."

Alvarez was just taking out her cell phone to call 911 when the second man entered the bathroom. He told her to give him the phone. When she said no, he "pushed [her] against the wall and put the gun to [her] stomach and told [her] to give him the cell phone." She then complied. The two men left.

When the police interviewed Mora, she told them that defendant was one of the robbers. She identified a photo of him. She also identified him in a field lineup.

Like Mora, Alvarez knew defendant from high school and from his dating another employee of the restaurant. However, she was not able to identify either of the robbers. She also admitted that she would not be able to tell "whether a gun is real or fake."

After the police arrested defendant, he admitted that he and his cousin, Angel Hernandez,[2] had committed the robbery. He explained that his family had just been evicted, "so he took it upon himself to go get some money so he could find a place for him and his family to live." He picked Five Buck Pizza "because he was familiar with the store and thought it would be easy."

Defendant claimed that the guns used during the robbery were only BB guns. He also claimed that, when he ran out the back door, the bag in which he was carrying the money ripped and the money fell out. He said that he "cut through" a nearby apartment complex, then ran home.

The police were never able to find any of the proceeds of the robbery nor the guns that were used. In the apartment complex that defendant had identified, however, they did find two Bank of America money bags that had been taken from Five Buck Pizza. "[S]ome kids" turned in a cash register money tray, also taken from Five Buck Pizza, which they said they had found in the same apartment complex.

B. *Gang Evidence*.

Detective Armand Tambouris of the Corona Police Department testified as a gang expert. He described the Corona Varrio Locos, or CVL, as a gang active in and around

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[2] A gang expert admitted that, at least at the time of the robbery, Hernandez was not a gang member.

Corona. CVL members used identifying signs or symbols, including "4th Street" and a crown.[3] They also carried blue bandannas.

According to Detective Tambouris, CVL's primary activities included robberies, burglaries, shootings, stabbings and other assaults, graffiti, and vandalism. Exhibits 7 and 8 showed that Matthew Lopez and Jesse York had each pleaded guilty to robbery. Detective Tambouris testified that Lopez and York were both members of CVL.

In the opinion of Detective Tambouris, defendant was "an active member" of CVL. In September 2005, Detective Tambouris's partner had contacted defendant. During that contact, defendant admitted that he was a member of CVL, having been "jumped in" when he was 11. Defendant added that "CVL was upset with him because he had not been putting in work." Detective Tambouris explained that "putting in work" meant committing crimes. At the time of the contact, defendant was wearing a hoodie that said "[S]outh [S]ide 13," as well as a blue bandanna. The number "13" is associated with Southern California, or "Sureño," gangs.

Detective Tambouris's opinion that defendant was a member of CVL was also based, in part, on the following items found by defendant's bed during a search of his home.[4]

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[3] "Corona" means "crown" in Spanish.

[4] Although these items were introduced as exhibits, the parties have not included them in the clerk's transcript, nor have they requested that these original exhibits be transmitted to this court. We therefore rely on the witnesses's descriptions of the exhibits in their testimony.

Exhibit 1 was a photo showing defendant with "CVLS," "CT," "4th Street," and "13" written (though not tattooed) on his body. "CT" stood for "Crown Town," meaning Corona.

Exhibit 4 consisted of multiple photos, including one of defendant and a female jointly flashing a "13" sign.

Exhibit 5 was a photo showing defendant and four other men; defendant and a second man were wearing blue bandannas, and this second man was flashing a "CVL" gang sign. A third man in the photo was flashing a "13" sign.

Exhibit 6 was a photo of a drawing of a crown with the number "4" written over it, the words "CVLS" and "Corona" on it, and the word "Shorty" underneath it.

In Detective Tambouris's opinion, the Five Buck Pizza robbery was committed for the benefit of CVL. He testified that the commission of any violent crime by a CVL member tended to get respect for the gang and to intimidate victims and witnesses so that they would not testify. Also, the gang would benefit financially from the proceeds of a robbery.

C. *Defense Evidence.*

Defendant's mother and stepfather both testified that, on the day of the robbery, the family received an eviction notice.

II

THE SUFFICIENCY OF THE EVIDENCE

TO SUPPORT THE GANG PARTICIPATION CONVICTION

Defendant contends that there was insufficient evidence, in several respects, to support the gang participation charge.

The crime of gang participation is committed by "actively participat[ing] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and . . . willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang . . . ." (Pen. Code, § 186.22, subd. (a).)

A "pattern of criminal gang activity" is defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [specified] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons . . . ." (Pen. Code, § 186.22, subd. (e).) The specified offenses are generally serious crimes, including homicide, robbery, burglary, and aggravated assault. (*Ibid*.; see also *id*., subd. (j).)

A. *Evidence of Active Participation*.

First, defendant argues that there was insufficient evidence that he actively participated in the gang.

"[A] person 'actively participates in any criminal street gang,' within the meaning of [Penal Code] section 186.22(a), by 'involvement with a criminal street gang that is more than nominal or passive.' [Citation.]" (*People v. Castenada* (2000) 23 Cal.4th 743, 752.) "[I]t is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang . . . ." (Pen. Code, § 186.22, subd. (i).)

In *People v. Martinez* (2008) 158 Cal.App.4th 1324, the court found sufficient evidence that the defendant actively participated in the King Kobras gang, as follows: "[An expert] testified he believed defendant was an active member of the King Kobras. He based this on review of booking photos of defendant that showed he had a VKKR tattoo over his eyebrow and a KK tattoo on the back of his head, which could be seen because he had a shaved head. He also spoke with a detective who had interviewed defendant after his arrest and reported that defendant said he had grown up in East Los Angeles, admitted being a member of King Kobras, and gave a gang moniker. He also relied on the crime defendant committed, one of the gang's primary activities, and that he did it in association with another gang member . . . ." (*Id*. at p. 1331.)

Here, similarly, just three months before the robbery, defendant had admitted being a member of CVL. While there was no evidence that he had any CVL tattoos, there was a photo of him with CVL symbols written on his body. Moreover, he displayed CVL paraphernalia in his bedroom, including drawings and photographs with CVL symbols. Some of the photos showed him wearing a blue bandanna. One showed him flashing a

gang sign. Moreover, they showed him socializing with apparent CVL members. While Detective Tambouris said he was unaware of any moniker defendant had, he then added, "Other than . . . the crown that was found above his head with the name Shorty, that's the only moniker that we have." The jury could reasonably infer that Shorty was defendant's gang moniker. Finally, defendant committed robbery, and Detective Tambouris testified that robbery was one of the gang's primary activities.

The only even arguable distinction between this case and *Martinez* is that there was no evidence that defendant's accomplice in the charged robberies (identified by defendant as his cousin, Angel Hernandez) was a gang member. Nevertheless, the robberies tended to show defendant's active participation in CVL.

Defendant relies on his own statement that he was "on the outs" with the gang because "[h]e hadn't been putting in work for the gang." It is fairly inferable, however, that he made up for this by committing the charged robberies.

Defendant also argues that we cannot consider his commission of the charged robberies because, by finding the charged gang *enhancement* under Penal Code section 186.22, subdivision (b) to be *not* true, "the jury clearly found that the robberies were not committed for the benefit [of], or in association [with] or at the direction of" CVL. The jury, however, was entitled to return inconsistent verdicts. "As a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] For example, 'if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense,

effect is given to both.' [Citation.] . . . It is possible that the jury arrived at an inconsistent conclusion through 'mistake, compromise, or lenity.' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 600.) Thus, even assuming it found that this element of the gang enhancement was not satisfied, it was entitled to find that a related (or even identical) element of the gang participation charge *was* satisfied. In reviewing the sufficiency of the evidence, we may disregard an inconsistent not true finding; we ask only if the evidence in the record is sufficient to support the verdict of guilt. (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1657.)

Separately and alternatively, for purposes of the sufficiency of the evidence, it was not necessary that defendant commit the charged robberies specifically in association with the gang. It was enough that — in addition to decorating his body with gang symbols, keeping gang paraphernalia in his bedroom, socializing with gang members, and having a gang moniker — defendant engaged in the characteristic gang activity of robbery. This is true even if he did so on his own account. It was still evidence that he was an active, rather than passive, participant in the gang.

We therefore conclude that there was sufficient evidence that defendant actively participated in CVL.

B. *Evidence of Knowledge That Members Engage in a Pattern of Criminal Gang Activity*.

Defendant argues that there was insufficient evidence that he knew that members of the gang engaged in a pattern of criminal gang activity.

To show the requisite pattern, the prosecution relied primarily on the fact that defendant's fellow gang members — Lopez and York — had been convicted of a robbery committed in October 2004. There was no evidence that defendant knew of that particular robbery.

Defendant did say, however, that he was "on the outs" with the gang because "[h]e hadn't been putting in work." An expert testified that "work," in this context, meant "criminal activity . . . either at the direction of or [in] association with or [for] the benefit of that gang." There was also expert testimony that the gang's primary activities were shootings, stabbings, other assaults, robberies, burglaries, and vandalism. From the evidence that defendant actively participated in CVL (see part II.A, *ante*), it was fairly inferable that he was at least generally aware of the gang's primary activities. Finally, it was fairly inferable that, when he referred to "work," he had in mind all of the criminal activities of the gang, including those crimes that would suffice to constitute a pattern of criminal gang activity.

We therefore conclude that there was sufficient evidence that defendant had the requisite knowledge that members of CVL engaged in a pattern of criminal gang activity.

C. *Evidence That Defendant Promoted, Furthered, or Assisted in Felonious Criminal Conduct by Gang Members.*

Defendant argues that there was insufficient evidence that he promoted, furthered, or assisted in any felonious criminal conduct by gang members.

In *People v. Castenada*, *supra*, 23 Cal.4th 743, our Supreme Court referred to this "promote/further/assist" element as aiding and abetting, stating: "[Penal Code] section 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also *aided and abetted* a separate felony offense committed by gang members . . . . [Citations.]" (*Id.* at p. 749, italics added.)

Here, as far as the evidence showed, defendant was not involved in any felonious conduct other than the charged robberies. In those robberies, he was a perpetrator, not an aider and abettor. Citing *Castenada*, defendant argues that perpetration fails to satisfy the "promote/further/assist" element.

In *People v. Ngoun* (2001) 88 Cal.App.4th 432 [Fifth Dist.], however, the court held that the promote/further/assist element can *also* be satisfied by evidence that the defendant was the *perpetrator* of a felony. (*Id.* at pp. 435-437.) It explained: "Courts should give statutory words their plain or literal meaning unless that meaning is inconsistent with the legislative intent apparent in the statute. [Citations.] . . . [L]iability attaches to a gang member who 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' [Citation.] In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; and 'assist' means to give aid or support. [Citation.] The literal meanings of these critical words squares with the expressed purposes of the lawmakers. An active gang

member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (*Id*. at p. 436.)

Admittedly, the court also reasoned that "[s]everal reported opinions have involved a defendant convicted both as a perpetrator of a substantive felony and as a gang member under [Penal Code] section 186.22, subdivision (a) based upon the same felony. . . . Although we recognize that the contention advanced by appellant here was not raised in any of these cases, all of these convictions were affirmed without mention of the issue." (*People v. Ngoun*, *supra*, 88 Cal.App.4th at pp. 436-437.) According to *Ngoun*, one such case was *Castenada* itself. (*Ngoun*, at p. 437.)

We do not necessarily agree with this characterization of *Castenada*. There, in addition to gang participation, the defendant was convicted of robbery and attempted robbery. (*People v. Castenada, supra,* 23 Cal.4th at pp. 745-746.) Victims Venegas and Castillo had been walking down the street together "when defendant and two companions began to follow them. Defendant pointed a handgun at Venegas and demanded money, while one of his companions made a similar demand of Castillo. Both victims said they had no money. Defendant then took Venegas's watch and tried to pull a gold chain off his neck. When Venegas broke away and screamed for help, defendant and his

companions fled." (*Id*. at p. 745.) Thus, the defendant was the direct perpetrator of the robbery of Venegas; however, he was arguably only an aider and abettor of the attempted robbery of Castillo. To put it another way, there was substantial evidence that the defendant *had* aided and abetted a felony.

In any event, as the court noted later in *Castenada*, there the defendant "d[id] not contest . . . that through the robbery and attempted robbery . . . , he 'promote[d], further[ed], or assist[ed]' felonious criminal conduct of [a] gang in violation of [Penal Code] section 186.22(a)." (*People v. Castenada*, *supra*, 23 Cal.4th at p. 753.) Hence, as the *Ngoun* court noted, in *Castenada* itself, the Supreme Court was not actually called upon to decide whether evidence that the defendant perpetrated a felony could be sufficient to satisfy the promote/further/assist element.

For precisely that reason, however, the language in *Castenada* equating the promote/further/assist element to aiding and abetting was dictum. On the other hand, the reasoning of *Ngoun*, which was *not* dictum, is compelling — a gang member who perpetrates a felony by definition also promotes and furthers that same felony. Thus, we do not believe that *Castenada* required the *Ngoun* court to come to any different conclusion.

We also note a different — although related — argument that is lurking in this case. The promote/further/assist element requires that the defendant "promote[], further[], or assist[] in any felonious criminal conduct by [gang] *members* . . . ." (Pen. Code, § 186.22, subd. (a), italics added.) One could argue that this element cannot be

satisfied by evidence that the defendant perpetrated a felony alone or with nongang members (such as defendant's cousin).

In *Ngoun*, the statement of facts was regrettably left unpublished. (See *People v. Ngoun*, *supra*, 88 Cal.App.4th at p. 434.) The court's discussion, however, indicates that, while the defendant was the direct perpetrator of murder and aggravated assault, he was aided and abetted by at least one other gang member. It stated: "Appellant was an active gang member who went with other Modesto Hit Squad members to a party where he knew other rival gang members would be. He went armed in anticipation of a confrontation and asked a fellow gang member to 'watch his back.' During the party there was a conflict between members of the two gangs. Appellant was 'disrespected' by members of Oak Street Posse. He fired into a crowd of people which included members of the rival gang, including those with whom he had had an adversarial encounter earlier in the evening." (*Id*. at p. 437.) Accordingly, this somewhat different argument was not presented in *Ngoun*.

However, it was presented squarely later in *People v. Salcido* (2007) 149 Cal.App.4th 356 [Fifth Dist.]. There, the evidence showed that the defendant had committed felonies, as the direct perpetrator, on two occasions. First, in April 2005, he had been found to be in possession of concealed weapons. (*Id*. at pp. 359-360.) Second, in September 2005, he had been found to be driving a stolen car while having a concealed, loaded firearm in the car. (*Id*. at p. 360.) On both occasions, he had been in

the presence of fellow gang members (*id.* at pp. 361-362), but there was no evidence that those gang members had aided and abetted his crimes. (*Id*. at p. 368.)

On appeal, the defendant argued that the trial court had erred by instructing that the promote/further/assist element could be satisfied by evidence that he "'*either* directly and actively commit[ed] a felony offense *or* aid[ed] and abet[ed] felonious criminal conduct by members of th[e] gang." (*People v. Salcido*, *supra*, 149 Cal.App.4th at p. 366, some italics omitted; see also *id*. at p. 367.) As the court explained: "Salcido attempts to distinguish *Ngoun* on the ground that there, other gang members actually were present when the appellant committed the murder and assaults underlying his [Penal Code] section 186.22, subdivision (a), conviction. He contends *Ngoun* stands for the proposition that a '[principal] who commits a crime jointly with other gang members is equally liable under section 186.22, subdivision (a).' Salcido asserts that [section 186.22,] subdivision (a) imposes liability on perpetrators only if they commit the crime in concert with other gang members. In *Ngoun*, however, we placed no limitation on our holding. To the contrary, we concluded that the subdivision 'applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor.' [Citation.] Even though in *Ngoun* other gang members were present when the crimes were committed, it is uncertain whether they participated in the crimes. [Citation.] Here, Salcido was accompanied by known gang members on both occasions, although there was no evidence they participated in Salcido's crimes. In each case, however, '[t]he evidence supports a reasonable inference that the [crimes] were intended by appellant to promote,

further and assist the gang in its primary activities — the commission of criminal acts and the maintenance of gang respect.' [Citation.]" (*Id*. at p. 368.)

Here, defendant appears to be arguing *only* that the promote/further/assist element cannot be satisfied by evidence that he was a direct perpetrator. This argument, as he recognizes, was rejected in *Ngoun*. He does *not* appear to be arguing that this element *also* requires evidence that he was aided and abetted by one or more fellow gang members. We therefore deem this contention forfeited. Even if it had been raised, however, we would reject it on the authority of *Salcido*.

In sum, then, we find sufficient evidence to support the gang participation conviction.

D. *Instructional Error*.

In a separately captioned argument, defendant also contends that the instruction on the elements of the gang participation offense, Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 1400, was erroneous because it indicated that the promote/further/assist element could be satisfied by evidence that defendant was a direct perpetrator.[5] As we have already held, under *Ngoun*, this was a correct statement of the law. Hence, we reject this argument, as well.

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[5] CALCRIM No. 1400, as given in this case, provided:

"The defendant is charged in Count 3 with participating in a criminal street gang, in violation of Penal Code section 186.22(a).

"To prove the defendant is guilty of this crime, the People must prove that:

"1. The defendant actively participated in a criminal street gang;

[footnote continued on next page]

III

THE ADMISSIBILITY OF GANG MEMBERS' GUILTY PLEAS AND OTHER ADMISSIONS UNDER THE CONFRONTATION CLAUSE

Defendant contends that expert testimony based on gang members' out-of-court guilty pleas and admissions that they were members of the gang violated the confrontation clause, as construed in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*).

A. *Additional Factual and Procedural Background.*

In connection with the gang participation charge, the prosecution had to prove, among other things, that members of the gang had committed, attempted to commit, or been convicted of two or more specified offenses (predicate offenses). (Pen. Code, § 186.22, subds. (a), (e).)

Detective Tambouris testified that, in his opinion, Matthew Lopez was a CVL member. This opinion was based on "a report [he] reviewed," which indicated that Lopez "was claiming CVL . . . ." He also testified that Lopez committed robbery on October 18,

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[footnote continued from previous page]

"2. When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity, and[]

"3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by directly and actively committing a felony offense or aiding and abetting a felony offense."

2004. His knowledge of this was based on his "case file"; also, he was "familiar" with the case in which Lopez had been convicted.

Similarly, Detective Tambouris testified that Jessie York was a CVL member, that York committed robbery on October 18, 2004, and that York was later convicted.

The prosecution introduced Exhibits 7 and 8, which were certified copies of court records showing that Lopez and York had each pleaded guilty to a robbery allegedly committed on October 18, 2004. The trial court admitted both exhibits.

Defense counsel did not object to any of this evidence.

B. *Analysis*.

Defense counsel forfeited defendant's present contention by failing to object to the challenged evidence. (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1220.) Admittedly, as defendant argues, the contemporaneous objection requirement may be excused "'when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.' [Citations.]" (*People v. Black* (2007) 41 Cal.4th 799, 810.) However, *Crawford* itself was decided more than four years before the trial in this case. Defendant argues that its application to the types of statements involved here — (1) statements identifying a person as a gang member, and (2) guilty pleas — was unclear. However, he cites no later case holding that *Crawford* does, in fact, apply to such statements. Thus, he has not shown any unforeseeable *change* in the law.

Indeed, as defendant concedes, the only subsequent California case on point is *People v. Thomas* (2005) 130 Cal.App.4th 1202 [Fourth Dist., Div. Two]. There, this court held that *Crawford* did *not* bar the admission of an expert's testimony that other gang members had stated that the defendant was a gang member. (*Thomas*, at pp. 1208-1210.) Defendant gamely argues that the contemporaneous objection requirement was excused because, in light of *Thomas*, any objection would have been futile. Of course, to the extent that an objection would have been futile under *Thomas*, *Thomas* also requires us to reject defendant's present contention in this appeal. In other words, defendant's contention must be either (1) forfeited or (2) wrong.

Actually, with regard to the expert's reliance on statements that Lopez was a CVL member, *Thomas* does require us to reject defendant's contention. *Crawford* held that the confrontation clause bars the admission of a testimonial hearsay statement by a witness who does not appear at trial unless the witness is unavailable and the defendant had had a prior opportunity for cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54.) While the court declined "to spell out a comprehensive definition of 'testimonial'" (*id*. at p. 68, fn. omitted), it did hold that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial . . . ." (*Id*. at p. 52.) The court also noted, however, that "[t]he [confrontation c]lause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Id*. at p. 59, fn. 9.)

Accordingly, in *Thomas*, we held that out-of-court statements that the defendant was a gang member were admissible as the basis for the expert's opinion that the defendant was a gang member: "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion." (*People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210.)

This reasoning applies squarely to the expert's opinion in this case that Lopez was a gang member, which was based on Lopez's own statements.

The expert never actually explained the basis for his opinion that York was a gang member. Certainly he never testified that it was based on out-of-court statements, rather than, say, on tattoos, paraphernalia, etc. However, even assuming it was based on such statements, it was admissible under *Thomas*.

While this appeal was pending, *People v. Dungo* (2009) 176 Cal.App.4th 1388 [Fourth Dist., Div. Three], petition for review filed October 2, 2009, held that an expert witness's opinion violates *Crawford* to the extent that it is based on and discloses the contents of a nontestifying expert's autopsy report. (*Id*. at pp. 1401-1404.) It recognized that *Thomas* had at least assumed that the out-of-court statements there were testimonial. (*Id*. at pp. 1402, citing *People v. Thomas, supra*, 130 Cal.App.4th at pp. 1208-1209.)

Nevertheless, it distinguished *Thomas* on the ground that there, the out-of-court statements were mere "casual conversations" and hence not testimonial, whereas in *Dungo*, the out-of-court statement was an "autopsy report . . . formally prepared in anticipation of a prosecution" and hence testimonial. (*Dungo*, at p. 1402, citing *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314, 321].)

As a matter of stare decisis, we must follow our opinion in *Thomas* that an expert can base his or her opinion on testimonial hearsay. We note, however, that even under *Dungo*, the expert testimony here would be admissible as based on nontestimonial hearsay.

Defendant also argues that Exhibits 7 and 8 were admitted, not just as the basis for the expert's opinion, but as substantive evidence of the necessary predicate offenses. This particular argument would not have been futile under *Thomas*; thus, as noted, defense counsel forfeited it by failing to raise it at trial.

Even if not forfeited, it lacks merit. We may assume, without deciding, that a guilty plea is testimonial within the meaning of *Crawford*. (See *People v. Duff* (2007) 374 Ill.App.3d 599, 603 [872 N.E.2d 46]; but see *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1224-1225 [records of defendant's prior convictions, admitted under Pen. Code, § 969b, are not testimonial under *Crawford*].) Even if so, here, the evidence was relevant even aside from its truth. The gang participation charge required that gang members *either* committed *or* were convicted of predicate offenses. (Pen. Code,

§ 186.22, subd. (e).) If the guilty pleas were used to establish that Lopez and York actually *committed* the predicate offenses, that would have been using them for their truth. However, the guilty pleas were used to establish that Lopez and York were *convicted* of the predicate offenses. They were relevant for this purpose, regardless of their truth. As such, they were not hearsay.

Admittedly, the expert also testified that Lopez and York actually *committed* the predicate offenses. This testimony was arguably based on their guilty pleas. But even if so — and again, even assuming that the guilty pleas were testimonial — any error in their use for this purpose was harmless, in light of the undoubted fact that Lopez and York were *also* convicted.

IV

PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

Defendant contends that the prosecutor committed misconduct by stating in closing argument that this was not defendant's first crime.

A. *Additional Factual and Procedural Background.*

According to the probation report, defendant had no adult criminal record. However, he had a prior juvenile adjudication for aggravated assault. (Pen. Code, § 245, subd. (a)(1).)

In closing argument, defense counsel remarked, "This is his first crime and he got caught."

In rebuttal, the prosecutor argued:

"[PROSECUTOR:] I was to correct a couple things that [c]ounsel first mentioned. One of the things he said is it's not true this was the defendant's first crime, that's not true. I'm not going to go into detail, but that's not a true statement.

"[DEFENSE COUNSEL]: I'm going to object; improper argument, your Honor.

"THE COURT: You made the statement, he can counter it. Move on."

B. *Analysis.*

Preliminarily, the People contend that defense counsel forfeited defendant's present contention by failing to object specifically on grounds of prosecutorial misconduct and by failing to request an admonition.

"To preserve a claim of prosecutorial misconduct for appeal, '"the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct." [Citations.]' [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 595, petn. for cert. filed Apr. 28, 2009.)

We find no such forfeiture. While defense counsel did not use the magic words, "prosecutorial misconduct," his actual objection, "improper argument," was adequate to alert the trial court to the nature of his objection. Moreover, the trial court essentially overruled the objection. "Forfeiture for failure to request an admonition will . . . not apply where the trial court immediately overruled the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition." (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

The prosecutor's comment was indeed misconduct. "'While counsel is accorded "great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation]," counsel may not assume or state facts not in evidence [citation] . . . .'" (*People v. Tafoya* (2007) 42 Cal.4th 147, 181.) This is particularly true when those facts would be inadmissible. (*People v. Davenport* (1985) 41 Cal.3d 247, 288.)

The People argue that defense counsel committed misconduct first. They assert that "a prosecutor may make comments that would otherwise be improper if they are fairly responsive to argument of defense counsel and based on the record." We question whether this is a correct statement of law; but even assuming it is, here, the prosecutor's remark was neither "fairly responsive" nor "based on the record." "Even if defense counsel's remarks were improper based on the state of the evidence, they did not justify the prosecutor's response. [Citation.]" (*People v. Bell* (1989) 49 Cal.3d 502, 539.) The prosecutor's remedy was to object to defense counsel's misconduct, not to commit misconduct himself.

We turn, then, to whether the misconduct was prejudicial. Defendant argues that it violated his federal constitutional rights to due process, confrontation, and a jury trial, so that the *Chapman*[6] standard of harmless error applies. We disagree. "'Prosecutorial comment is reversible as misconduct under the federal Constitution when it "'so infect[s]

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[6] *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

the trial with unfairness as to make the resulting conviction a denial of due process'"'; improper comment that 'falls short of rendering the trial fundamentally unfair' is error under state law. [Citation.]" (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323.) "'[I]n cases where jurors are improperly exposed to certain factual matters, the error is usually tested under the [state constitutional] standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836[, 299 P.2d 243]' [citation] . . . ." (*Id.* at pp. 1323-1324; e.g., *People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Under *Watson*, an error is prejudicial "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Here, the evidence that defendant was guilty of robbery was overwhelming; it included not only the testimony of an eyewitness who was acquainted with him, but also his own admission. Admittedly, the gang participation charge and the personal firearm use enhancement presented closer factual questions. However, if the jury was not already inflamed by the evidence that defendant robbed two women at what at least appeared to be gunpoint, it was unlikely to be swayed by the prosecutor's brief mention of some unspecified previous crime. Moreover, this *particular* jury was not carried away by passion or prejudice, as shown by the fact that it found the gang enhancement *not* true.

The jury was instructed that: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case. Their remarks

are not evidence." (CALCRIM No. 104.) We may presume that the jury followed this instruction. (*People v. Hamilton* (2009) 45 Cal.4th 863, 957.)

We conclude that the prosecutor's misconduct did not result in either a miscarriage of justice under the California Constitution or a violation of due process under the federal Constitution.

V

FAILURE TO INSTRUCT SUA SPONTE

ON A LESSER INCLUDED ENHANCEMENT

Defendant contends that the trial court erred by failing to instruct on a lesser included enhancement.

Defendant was charged with a personal firearm use enhancement. (Pen. Code, § 12022.53, subd. (b).) There was substantial evidence — i.e., his own statement to police — that the weapon he used was actually a BB gun. "A BB gun or pellet gun is not a 'firearm' for purposes of sentence enhancements [citation], but is a 'dangerous weapon' as the term is used in section 12022, subdivision (b). [Citations.]" (*People v. Dixon* (2007) 153 Cal.App.4th 985, 1001.) Hence, defendant argues that the trial court should have instructed sua sponte on the lesser included enhancement of personal use of a deadly or dangerous weapon. (Pen. Code, § 12022, subd. (b)(1).)

As defendant concedes, the California Supreme Court has held that there is no sua sponte duty to instruct on a lesser included enhancement. (*People v. Majors* (1998) 18 Cal.4th 385, 410-411.) It explained: "One of the primary reasons for requiring

instructions on lesser included offenses is '"to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between [guilt] and innocence"' — that is, to eliminate '"the risk that the jury will convict . . . simply to avoid setting the defendant free."' [Citation.] This risk is wholly absent with respect to enhancements, which a jury does not even consider unless it has already convicted defendant of the underlying substantive offenses. [Citation.]" (*Ibid*.)

Defendant argues, however, that this reasoning has been undermined by subsequent United States Supreme Court decisions. As he points out, *Majors* cited *People v. Wims* (1995) 10 Cal.4th 293, which had held that there is no federal constitutional right to a jury trial on an enhancement allegation. (*Wims*, at pp. 303-309.) Subsequently, however, in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], the United States Supreme Court held that there *is* a federal constitutional right to a jury trial on any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the statutory maximum. (*Id*. at p. 490.) Defendant concludes that "the essential principle underlying the *Apprendi* line of cases is that there can be no constitutionally meaningful distinction between 'sentencing or enhancement factors' and 'elements of the crime.'"

The flaw in defendant's reasoning is that, in general, there is no federal constitutional requirement to instruct on lesser included offenses at all. (*People v. Rundle* (2008) 43 Cal.4th 76, 142, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal. 4th 390, 421, fn. 22; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1267-1268.)

"There is an exception to this rule when the failure to instruct on a lesser included offense rises to the level of a federal constitutional violation because it renders the capital verdict unreliable under the Eighth Amendment. [Citation.] There also may be an exception when the error deprives the defendant of the federal due process right to present a complete defense. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 868, fn. 16.) This, however, was not a capital case. Moreover, the failure to instruct on a lesser included offense does not implicate the right to present a complete defense unless the instruction "embod[ies] the defense theory of the case"; and an instruction can hardly be said to embody the defense theory of the case when the defendant has not even requested it. (*Id*. at p. 872; cf. *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740 [defendant requested lesser included offense instruction]; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372 [same].)

It follows that, in a noncapital case, there is no federal constitutional duty to instruct on lesser included offenses sua sponte; such a duty exists solely as a matter of a state's constitution or laws. Thus, even assuming that an enhancement must be treated as the equivalent of an element of a crime for purposes of the federal Constitution (see, e.g., *People v. Seel* (2004) 34 Cal.4th 535, 548-550 [double jeopardy]), California may choose to not to treat it as such for purposes of its own state Constitution. We therefore conclude that we remain bound by *Majors* to reject defendant's present contention.

VI

THE REASONABLE DOUBT INSTRUCTION

Defendant contends that the general reasonable doubt instruction, CALCRIM No. 220, was erroneous.

CALCRIM No. 220, as given in this case, provided:

"The fact that a criminal charge had been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he's been arrested, charged with a crime or brought to trial.

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all of the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

Preliminarily, the People argue that defendant forfeited this contention by failing to object below. They cite *In re Sheena K.* (2007) 40 Cal.4th 875, 880, which stated that

"[o]rdinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal. [Citations.]" Immediately after that, however, it also stated: "The rule that a defendant who fails to make a claim in the trial court forfeits that claim on appeal is subject to exceptions. By statute, a defendant may challenge on appeal an instruction that affects his or her substantial rights even when no objection has been made in the trial court. (Pen. Code, § 1259; [citations].)" (*Id.* at p. 881, fn. 2.) This exception applies here.

Defendant argues that CALCRIM No. 220 is erroneous because, by telling the jury to "consider all the evidence that was received throughout the entire trial," it essentially precludes the jury from considering a *lack* of evidence. This argument has been roundly and repeatedly rejected. (*People v. Zavala* (2008) 168 Cal.App.4th 772, 780-781 [Fifth Dist.]; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1118-1119 [Sixth Dist.]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237-1238 [Second Dist., Div. Two]; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269 [Third Dist.]; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093 [Fifth Dist.]; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510 [Fourth Dist., Div. One].)

"Reasonable doubt may arise from the lack of evidence at trial as well as from the evidence presented. [Citation.] The plain language of CALCRIM No. 220 does not instruct otherwise. The only reasonable understanding of the language, '[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty,' is that a lack of evidence could lead to

reasonable doubt. Contrary to defendant['s] claim, CALCRIM No. 220 did not tell the jury that reasonable doubt must arise from the evidence. The jury was likely 'to understand by this instruction the almost self-evident principle that the determination of defendant's culpability beyond a reasonable doubt . . . must be based on a review of the evidence presented.' [Citations.]" (*People v. Campos, supra,* 156 Cal.App.4th at p. 1238.) "In addition, the trial court instructed the jury with CALCRIM No. 355, which specifically stated that a defendant "may rely on [the] state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt." (*People v. Flores, supra,* 153 Cal.App.4th at p. 1093.)

Defendant also argues that CALCRIM No. 220 is erroneous because, by telling the jury to "impartially compare" the evidence, it implies that the defense has some burden of proof and further implies that the jury should apply a preponderance of the evidence standard. This argument, too, has been rejected. (*People v. Stone* (2008) 160 Cal.App.4th 323, 331-332 [First Dist., Div. Three]; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157 [Fifth Dist.].) "The instruction simply tells the jury to 'compare and consider *all the evidence* that was received throughout the entire trial.' It does not instruct the jury to engage in any balancing of the evidence in the sense of comparing the evidence presented by one side against the evidence presented by the other side. Indeed, such an interpretation is completely inconsistent with the instructions as a whole. Elsewhere in the instruction the jury is told that '[t]he fact that a criminal charge has been filed against the defendant is not evidence that the charge is true' and that '[a] defendant

in a criminal case is presumed to be innocent, [which] . . . requires that the People prove each element of a crime beyond a reasonable doubt.' Further, the instruction tells the jury that '[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.'

"The idea that the jury would interpret 'compare' to mean that guilt is to be determined by a balancing-of-the scales approach which compares the evidence offered by two sides is further undercut by other instructions. The jury was told that '[n]either side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant.' The jury was also instructed that the 'defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt.' In sum, reading the instructions as a whole, together with the fact that nowhere in closing arguments do counsel so much as allude to a preponderance standard, we are convinced that there is no likelihood whatsoever that the jury could have interpreted the 'compare and contrast' language in the instruction in the manner suggested by defendant." (*People v. Stone*, *supra*, 160 Cal.App.4th at p. 332.)

Defendant cites *Coffin v. United States* (1895) 156 U.S. 432 [15 S.Ct. 394, 39 L.Ed. 481] for the proposition that an instruction to "impartially" consider the evidence undermines the presumption of innocence. That is a misreading of *Coffin*. There, the trial court *refused* the defendant's request for an instruction on the presumption of innocence. (*Id*. at p. 452.) However, it did instruct that the jury had to find the

defendants guilty beyond a reasonable doubt. (*Ibid*.) It further instructed that "'if, after weighing all the proofs, and looking only to the proofs, you impartially and honestly entertain the belief that the defendants may be innocent of the offences charged against them, they are entitled to the benefit of that doubt, and you should acquit them.'" (*Id*. at pp. 452-453.) The court held that the presumption of innocence and the requirement of proof beyond a reasonable doubt are distinct concepts, and hence that the refusal to instruct on the presumption of innocence was error. (*Id*. at pp. 458-461.) It specifically *declined* to hold that the reasonable doubt instructions, in themselves, were erroneous. (*Id*. at p. 461.) Here, of course, the trial court did instruct on the presumption of innocence. (CALCRIM No. 103.)

We therefore conclude that defendant has not shown that CALCRIM No. 220 was erroneous in any way.

VII

THE "COMMON SENSE AND EXPERIENCE" INSTRUCTION

Defendant contends that CALCRIM No. 226, to the extent that it instructed the jurors to use their "common sense and experience," was erroneous.

The relevant portion of CALCRIM No. 226, as given in this case, provided: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience."

Once again, the People argue that defendant forfeited this contention by failing to object. For the reasons we have already stated (see part VI, *ante*), we disagree.

Defendant argues that CALCRIM No. 226 is erroneous because it could be understood to allow the jurors to consider matters not in evidence. Not so. "To tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do. In approaching any issue, a juror's background, experience and reasoning must necessarily provide the backdrop for the juror's decisionmaking, whether instructed or not. CALCRIM No. 226 does not tell jurors to consider evidence outside of the record, but merely tells them that the prism through which witnesses' credibility should be evaluated is common sense and experience. Unlike *People v. Bickerstaff* (1920) 46 Cal.App. 764, 773 [190 P. 656] and *People v. Paulsell* (1896) 115 Cal. 6, 7 [46 P. 734], cited by [defendant], CALCRIM No. 226 does not instruct jurors to use their common sense and experience in finding reasonable doubt, which could potentially conflict with the beyond a reasonable doubt standard, but only in assessing a witness['s] credibility.

"Furthermore, other instructions given to jurors make clear that the term 'common sense and experience' is not a license to consider matters outside of the evidence. Jurors were instructed that they must decide the facts based on the evidence presented (CALCRIM No. 200), that they were not to conduct research or investigate the crime (CALCRIM No. 201), that their determination of guilt had to be based on evidence received at trial (CALCRIM No. 220), that they were only to consider evidence (sworn testimony and exhibits) presented in the courtroom (CALCRIM No. 222), that they had to decide whether facts have been proved based on 'all the evidence' (CALCRIM No. 223),

that they should review all the evidence before concluding that the testimony of one witness proves a fact (CALCRIM No. 301) and other instructions emphasizing the exclusive significance of the evidence. (CALCRIM No. 302.)" (*People v. Campos*, *supra*, 156 Cal.App.4th at p. 1240.)

We therefore conclude that defendant has not shown any error in giving CALCRIM No. 226.

VIII

CONSECUTIVE SENTENCING UNDER APPRENDI/BLAKELY/CUNNINGHAM

Defendant contends that the imposition of consecutive terms violated the Sixth Amendment,[7] as construed in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].

In *Oregon v. Ice* (2009) ___ U.S. ___ [129 S.Ct. 711, 172 L.Ed.2d 517] — decided while this appeal was pending — the United States Supreme Court held that the imposition of consecutive sentences does not implicate the Sixth Amendment. (*Id*. at pp. 714-715.) Accordingly, we reject this contention.

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[7] Defendant also invokes the right to due process under the Fourteenth Amendment, but apparently only as the vehicle through which the Sixth Amendment is applied to the states. (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 469, 476.)

IX

PENAL CODE SECTION 654

Defendant contends that, in light of the terms imposed for robbery, the term imposed for gang participation should have been stayed under section 654.

The trial court calculated the sentence as follows:

Count 1 (robbery), the principal term: Two years (the low term), plus 10 years on the personal firearm use enhancement.

Count 2 (robbery): Eight months (one-third the midterm), plus three years four months (one-third the fixed term) on the personal firearm use enhancement, to be served consecutively.

Count 3 (gang participation): Sixteen months (the low term), to be served concurrently.

Section 654, subdivision (a), as relevant here, provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

" . . . '"Section 654 has been applied not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." [Citation.] [¶] Whether *a course of criminal conduct* is divisible and therefore gives rise to more than one act

within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

"[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"'A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.' [Citation.]" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1336-1337.)

A. *People v. Herrera*.

The earliest case dealing with the application of section 654 in the context of a gang participation charge is *People v. Herrera* (1999) 70 Cal.App.4th 1456 [Fourth Dist., Div. Three].

In *Herrera*, two gangs engaged in a series of retaliatory shootings. In the most recent one, shots were fired at a house occupied by members of the defendant's gang.

One of them then drove and picked up the defendant, who explained to his girlfriend that "his 'home boys were after the guys.'" (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1461, fn. omitted.) The defendant and his cohort then drove by a house identified with the rival gang, made a U-turn, and drove by again, firing shots both times. On the first pass, two people were hit. (*Ibid.*)

As a result, the defendant was convicted of (among other things) one count of gang participation and two counts of attempted murder. (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1462.) The court held that section 654 did not require the trial court to stay the gang participation term. It explained: "'[M]ultiple punishment . . . may be imposed where the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives. [Citations.]' [Citation.]

"The characteristics of attempted murder and street terrorism are distinguishable . . . . In the attempted murders, Herrera's objective was simply a desire to kill. For these convictions, the identities (or gang affiliations) of his intended victims were irrelevant." (*People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1466-1467.) At this point, the court noted that there was "sufficient [evidence] to establish the specific intent to kill required for both counts of attempted murder. [Citations.]" (*Id.* at p. 1467.)

It continued: "[U]nder [Penal Code] section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is

upon the defendant's objective to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense. For example, this subdivision would allow convictions against both the person who pulls the trigger in a drive-by murder *and* the gang member who later conceals the weapon, even though the latter member never had the specific intent to kill. Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,]' thereby precluding application of section 654. [Citation.]" (*People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1467-1468, fns. omitted.) At this point, the court found sufficient evidence that the defendant "intended to aid his gang in felonious conduct, irrespective of his independent objective to murder." (*Id*. at p. 1468.)

Finally, the court added: "[I]f section 654 were held applicable here, it would render [Penal Code] section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. '[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." [Citation.]' [Citation.] We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1468, fn. omitted.)

Thus, as we read *Herrera*, it held *categorically* that section 654 *never* precludes multiple punishment for both gang participation and the underlying felony (at least when

the underlying felony requires a specific intent). As long as there is (1) sufficient evidence of the specific intent necessary to support the conviction for gang participation, and (2) sufficient evidence of the specific intent necessary to support the conviction for the underlying felony, there is — as a matter of law — sufficient evidence that the defendant had two independent, if simultaneous, objectives.

B. *People v. Vu*.

Herrera was followed by the Fourth District, Division Three in *People v. Ferraez* (2003) 112 Cal.App.4th 925 and by the Sixth District in *In re Jose P*. (2003) 106 Cal.App.4th 458. They both indicated that multiple punishment for gang participation and for the underlying offense is permissible as long as the underlying offense requires a different specific intent. (*Ferraez*, at p. 935 [possession of drugs with the intent to sell]; *Jose P*., at pp. 470-471 [robbery].) Thus, they added little to *Herrera*'s analysis.

Thereafter, however, the Fourth District, Division Three decided *People v. Vu* (2006) 143 Cal.App.4th 1009. The author of *Herrera* was a concurring panel member in *Vu*. There, the defendant and other members of his gang conspired to kill the victim under the mistaken impression that he was a member of a rival gang. (*Id*. at pp. 1012-1021.) The defendant was convicted of (among other things) gang participation and conspiracy to commit murder. (*Id*. at pp. 1012-1013.)

The court held that section 654 required the trial court to stay the gang participation term. (*People v. Vu, supra,* 143 Cal.App.4th at pp. 1032-1034.) It stated: "*Herrera* is distinguishable because the defendant was charged with a course of criminal

conduct involving two gang-related, drive-by shootings in which two people were injured. [Citation.] . . .

"Under *Neal*,[8] Vu committed different acts, violating more than one statute, but the acts of conspiracy and street terrorism constituted a criminal course of conduct with a single intent and objective. That single criminal intent or objective was to avenge [a fellow gang member]'s killing by conspiring to commit murder. Although that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent. Each intent was dependent on, and incident to, the other." (*People v. Vu*, *supra*, 143 Cal.App.4th at p. 1034.)

At this point, we merely note that *Vu*'s effort to distinguish *Herrera* was less than satisfying. As we mentioned, the defendant in *Herrera* drove by the same house twice, pausing only to make a U-turn in between, and fired shots on both passes. *Herrera* understandably treated this as a single drive-by shooting. The very first sentence was: "[Defendant] participated in *a gang-related shooting* in which a young boy and a man were injured." (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1460, italics added.) Even assuming the two passes could be regarded as separate shootings, both victims were injured — and thus, both attempted murders were committed — in the first pass. In any event, this distinction seems to go to why the defendant could be separately punished for

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8 The "intent and objective" test was first stated in *Neal v. State of California* (1960) 55 Cal.2d 11, 19.

the two attempted murders,[9] not why he could be separately punished for gang participation *in addition to* the two attempted murders. And finally, the court's stated reasoning in *Herrera* had nothing to do with how many shootings there were or how many people were injured; indeed, it had nothing to do with the facts of the particular case at all. Thus, as we see it, *Herrera* simply cannot be reconciled with *Vu*.

C. *People v. Tran.*

The Fourth District, Division Three most recently confronted the application of section 654 to gang participation in *People v. Tran* (2009) 177 Cal.App.4th 138, petition for review filed October 7, 2009.[10] *Tran* and *Herrera* share the same author. There, the defendant shot and killed an innocent bystander, thinking he was a member of a rival gang, the Oriental Play Boys. Immediately before the shooting, the defendant yelled, "Hey, that's Play Boy . . . ." (*Tran*, at pp. 143, 147; see also *id.* at p. 146.) As a result, he was convicted of murder and gang participation (along with other crimes). (*Id*. at p. 150.)

The court held that that section 654 required the trial court to stay the gang participation term. It explained: "In *People v. Herrera*, *supra*, 70 Cal.App.4th 1456, this court applied the separate but simultaneous objective test to conclude that section 654 did

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[9] This was not even an issue in *Herrera*, as multiple punishment for the two attempted murders was clearly permissible under the multiple victim exception to section 654. (See generally *People v. Oates* (2004) 32 Cal.4th 1048, 1063-1066.)

[10] In the interim, the court had decided *People v. Garcia* (2007) 153 Cal.App.4th 1499. Curiously, even though *Garcia* was written by the same author as *Vu*, it followed *Herrera* and its categorical approach without even mentioning *Vu.*

not apply where a gang member went on a drive-by shooting spree motivated by *both* a desire to promote the gang *and* 'simply a desire to kill.' [Citation.]

"We stress: In the present case, unlike *Herrera*, the evidence *affirmatively excludes* even the *possibility* that Tran might have had separate, but simultaneous, motives. Tran exclaimed, 'Hey, that's Play Boy . . . that's him, that's him, that's Play Boy," when he shot [the victim]. The statement will admit of no other possibility but that . . . he did not have a generalized desire to kill, but the specific desire to kill a rival gang member, as evidenced by the use of the gang moniker.

"Given these facts, the case of *People v. Vu*, *supra*, 143 Cal.App.4th 1009, rather than *Herrera*, controls. In *Vu*, like here, but unlike *Herrera*, there was no evidence that the defendant's shooting of the bystander had a dual purpose of a simple 'desire to kill' along with his desire to promote his gang. We therefore follow *Vu* and apply section 654 in this instance." (*People v. Tran*, *supra*, 177 Cal.App.4th at p. 163.)

Once again, this attempt to distinguish *Herrera* is unsatisfying. In *Herrera*, there was no *evidence* that the defendant had a "desire to kill" separate and apart from his desire to aid his gang. Indeed, in discussing another issue (whether there was sufficient evidence of premeditation and deliberation), the court relied on evidence that the two gangs were at war and that, shortly before the shooting, " . . . Herrera told his girlfriend his 'home boys were after the guys,' an apparent reference to his gang's need to retaliate for the shooting at the West Myrtle hang-out." (*People v. Herrera*, *supra*, 70 Cal.App.4th

at p. 1463.) As evidence of intent and objective, this seems indistinguishable from a shout of, "Hey, that's Play Boy . . . ."

Moreover, the purported distinction subverts the standard of review. As we have mentioned, the substantial evidence standard of review applies. In other words, multiple punishment is barred, unless there is substantial evidence that the defendant had multiple motives. (*People v. Racy*, *supra*, 148 Cal.App.4th at pp. 1336-1337.) *Tran*, however, held that multiple punishment is *allowed*, unless "the evidence *affirmatively excludes* even the *possibility*" that the defendant had multiple motives. (*People v. Tran*, *supra*, 177 Cal.App.4th at p. 163.) Thus, multiple punishment is apparently permissible, even in the absence of *substantial evidence* of multiple motives.

D. *Our Resolution*.

We have a number of problems with *Herrera*.

First, Herrera's focus on the defendant's culpability was misleading. The Supreme Court has cautioned: "We have often said that the purpose of section 654 'is to insure that a defendant's punishment will be commensurate with his culpability.' [Citation.] *The* Neal *test does not, however, so ensure*. A person who commits separate, factually distinct, crimes, even with only one ultimate intent and objective, is more culpable than the person who commits only one crime in pursuit of the same intent and objective. . . . A rapist should not be insulated from punishment for separate crimes such as kidnapping even if part of the same criminal venture." (*People v. Latimer* (1993) 5 Cal.4th 1203,

1211, italics added.) Thus, while certainly we should not lose sight of the defendant's particular culpability, it cannot be determinative.

Second, the categorical reasoning of *Herrera* is not limited to gang participation. Rather, it would mean that *every* time a defendant is convicted of two crimes with different specific intent requirements, section 654 would not apply. But this is not the law. For example, in *People v. Ridley* (1965) 63 Cal.2d 671, the defendant was convicted of (among other things) robbery of victim Bennett and assault on Bennett with a deadly weapon with the intent to commit murder. (*Id*. at pp. 673, 677.) These crimes had different specific intent requirements: assault with the intent to commit murder required the intent to kill, whereas robbery required the intent to permanently deprive. (See *People v. Burney* (2009) 47 Cal.4th 203, 234.) Nevertheless, the court held that section 654 barred punishment for both, because "it appears that the assault upon Bennett was the means of perpetrating the robbery and that both offenses were incident to one objective, robbery." (*Ridley*, at p. 678.)

Third, the fact that the defendant had multiple objectives did not necessarily mean that he had multiple *independent* objectives. Section 654 bars multiple punishment *even if* the defendant has "'multiple criminal objectives,'" as long as those objectives were not "independent" but "merely incidental to each other . . . ." (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335.) The focus is not on the statutory elements of the crimes; rather, it is on the *particular* defendant's *actual* intent and objective. For example, in *Latimer*, the defendant was convicted of both kidnapping and rape. (*People v. Latimer*, *supra*, 5

Cal.4th at p. 1206.) The Supreme Court stated: "It could be argued that defendant had two intents: (1) to drive the victim against her will to an isolated area, and (2) to rape her. Cases applying the *Neal* rule, however, make clear that multiple punishment for both the rapes and the kidnapping is prohibited under the circumstances of this case. Although the kidnapping and the rapes were separate acts, the evidence does not suggest any intent or objective behind the kidnapping other than to facilitate the rapes." (*Id*. at p. 1216.) Likewise, in *Herrera*, from the court's statement of facts, it seems inescapable that the defendant's intent to kill was purely incidental to his intent to aid his gang.

Fourth, we question *Herrera*'s statement that a defendant convicted of gang participation "does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) . . . ." (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1467.) The court's point seems to have been that a defendant could commit gang participation without necessarily committing the underlying felony (and thus without having whatever intent the underlying felony may require).

This is true, but irrelevant. For there to be a section 654 issue at all, the defendant must be found guilty of both gang participation and the underlying felony. And to be found guilty of gang participation, the defendant must *either* personally commit the underlying felony, *or* "*willfully* promote[], further[], or assist[]" the underlying felony. (Pen. Code, § 186.22, subd. (a).) Thus, *if* the defendant is also found guilty of the underlying offense, the defendant's intent and objective in committing both offenses must be the same.

Herrera used the example of a murder committed by other gang members when the defendant is merely an accessory after the fact, and thus neither a perpetrator nor an aider and abettor of the murder. This ignores the fact that, in such a case, the defendant cannot be convicted of *murder* but *can* be convicted of *being an accessory*. (Pen. Code, § 32.) In applying section 654, the question is not whether the defendant's intent and objective in committing gang participation was the same as the intent and objective of the *gang* in committing the *murder*, but whether it was the same as the *defendant's* intent and objective in committing the crime of being an *accessory*. Perforce it was.

This is the point that we find dispositive. Here, the underlying robberies were the act that transformed mere gang membership — which, by itself, is not a crime — into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. Gang participation merely requires that the defendant "willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang . . . ." (Pen. Code, § 186.22, subd. (a).) It does not require that the defendant participated in the underlying felony with the intent to benefit the gang. (See *People v. Leon* (2008) 161 Cal.App.4th 149, 161-163 [so construing gang enhancement, Pen. Code, § 186.22, subd. (b)]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [same] [Fourth Dist., Div. Two].)

In our view, the crucial point is that, here, as in *Herrerra*, *Vu*, and *Tran*, the defendant stands convicted of both (1) a crime that requires, as one of its elements, the

intentional commission of an underlying offense, and (2) the underlying offense itself. Thus, the most analogous line of cases involves convictions for both felony murder and the underlying felony. It has long been held that section 654 bars multiple punishment under these circumstances. (*People v. Meredith* (1981) 29 Cal.3d 682, 695-696; *People v. Boyd* (1990) 222 Cal.App.3d 541, 575-576 [Fourth Dist., Div. Two]; *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 547; *People v. Magee* (1963) 217 Cal.App.2d 443, 470-472.) The logic is that the underlying felony "is a statutorily defined element of the crime of felony murder" (*Boyd*, at p. 576), and thus the underlying felony is "the same act which made the killing first degree murder." (*Id.* at p. 575.)

Most significantly for our purposes, multiple punishment for both felony murder and the underlying felony is barred even when there is evidence that the killing was intentional and premeditated (e.g., *People v. Mulqueen*, *supra*, 9 Cal.App.3d 532, 542-543); thus, the trial court *could* have found that the defendant had the intent and objective of killing in connection with the murder, as well as the separate intent and objective of taking property in connection with an underlying robbery.

Of course, the situation is different if the jury was allowed to find the defendant guilty of first degree murder based on *either* a premeditation and deliberation theory *or* a felony murder theory; in that case, multiple punishment for the underlying felony is permitted, because the jury may have found an intent to kill separate and apart from the intent to commit the underlying felony. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Rogers* (1981) 124 Cal.App.3d 1071, 1080-1081.) Here, however, the

only way the jury could have found defendant guilty of gang participation was by finding that he committed the underlying robberies.[11]

Of course, it could be argued that, even if *Herrera* was wrong on its facts, this case presents a better argument for holding that section 654 does not apply. *Herrera* involved a classic gang drive-by shooting, committed to retaliate against a rival gang. (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1461.) Thus, the jury found gang enhancements to the attempted murders true. (*Id*. at p. 1462.) This should have made it hard to argue that the defendant's objective in committing the attempted murders was something other than his objective in participating in the gang.

Here, by contrast, there was evidence that defendant committed the robberies solely to help his family financially. His one accomplice was his cousin, who was not a gang member. Thus, the jury found the charged gang enhancements *not* true. On its face, then, the facts in this case more strongly support an argument that defendant had a different intent and objective in committing the robberies than in committing gang participation.

Nevertheless, in our view, the crucial fact is that the robberies — even if not gang-motivated — were necessary to satisfy an element of the gang participation charge. (See

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11 The outcome also may be different if the multiple victim exception to section 654 applies. (See, e.g., *People v. Young* (1992) 11 Cal.App.4th 1299, 1311-1312.)

part II, *ante*.) Accordingly, almost by definition, defendant had to have the same intent and objective in committing all of these crimes.

We therefore conclude that, given the sentences for the robberies, defendant could not be punished separately for gang participation. In our disposition, we will stay this term.

X

THE ABSTRACT OF JUDGMENT

Defendant contends that, while the abstract of judgment correctly reflects his total sentence, it contains clerical errors regarding the calculation of that total.

The abstract of judgment erroneously reflects a two-year "enhancement" on count 1 under Penal Code section 1192.7, subdivision (c)(8) (although it still reflects the correct total sentence on this count of 12 years). It also erroneously reflects that the sentence on count 2 was two years, to be served full term and consecutively, and that the personal firearm use enhancement on count 2 was stayed. (See part IX, *ante*.)

The People concede that the abstract should be corrected. Accordingly, in our disposition, we will direct the trial court to do so.

XI

DISPOSITION

The judgment is modified, as follows: The 16-month term imposed on count 3 (gang participation) is hereby stayed. This stay shall become final if and when defendant has served the remainder of his sentence. The judgment as thus modified is affirmed.

The trial court is directed to prepare an amended abstract of judgment, including the corrections indicated in part X, *ante,* and to forward certified copies of it to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

McKINSTER
J.